November 2002

Takings Watch

CRC's Monthly Update on Regulatory Takings

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FEATURE CASES

Can *Granting* a Permit Cause a Taking?
Swartz v. Beach, 2002 WL 31259995 (D.Wyo. Oct. 4, 2002),
Daniels v. Area Plan Comm'n of Allen County, 306 F.3d 445 (7th Cir. 2002)

Takings cases usually follow familiar patterns: the government enacts land-use controls or denies a permit to protect the community, and then an affected landowner claims the government has taken the land. A host of cases govern this common scenario. But can a taking result when the government grants a permit? It's a question two courts have recently considered.

In *Swartz*, a Wyoming rancher filed a takings challenge to the state's approval of a Clean Water Act discharge permit for a neighboring gas company that produces coal bed methane. The rancher contends that methane-contaminated discharge flowing through a creek on his property made his ranch unsuitable for irrigation and caused soil damage. The merits have not been decided, but the claim survived a motion to dismiss. In allowing the matter to proceed, the court likened the case to physical possession. In addition, the court cited an 1872 Supreme Court case indicating that "where water is superinduced onto private property and that water destroys the land's usefulness, it is a taking within the meaning of the Fifth Amendment." It remains to be seen whether the rancher will prove his claim at trial.

In *Daniels*, owners of lots within a subdivision claimed a taking when the government granted a commercial development permit and vacated covenants that restricted the lots to residential use. By allowing a private party to develop commercial properties within the subdivision, the lot owners argued, the government improperly took a property right for the benefit of a private developer. After finding that the case met ripeness and exhaustion standards, the Seventh Circuit agreed. Although the permit did not reduce the value of the plaintiffs' property, the court held that under Indiana law a restrictive covenant constitutes a constitutionally protected property interest. The court affirmed the district court's injunction prohibiting the county from vacating the covenants for a private purpose.

Swartz and *Daniels* are reminiscent of the 1998 ruling in *Bormann v. Board of Supervisors*, where the Iowa Supreme Court held that the government worked a taking of a "nuisance easement" on nearby land where it approved applications for agricultural use. Of course, a permit denial in any of these cases might have prompted a takings challenge by the applicant. These cases illustrate well that developers' claims to a "right to develop" frequently are counterbalanced by claims by neighboring landowners of a "right" to be free from the harmful spillover effects of development.

ON THE HORIZON

NAHB's Continued Attack on *Williamson County*

On October 10, the U.S. Court of Appeals for the Eighth Circuit heard argument in *Kottschade v. City of Rochester* (No. 02-1504), yet another frontal assault on *Williamson County*'s ripeness requirements by the National Association of Home Builders. Having failed to gut *Williamson County* through federal legislation, NAHB now takes the remarkable position that *Williamson County* already has been eviscerated by a 1997 ruling called *City of Chicago v. International College of Surgeons*.

Appearing on the brief for Kottschade, NAHB argues to the Eighth Circuit that *College of Surgeons* "axiomatically modified" *Williamson County*'s state-court compensation requirement. Yet *College of Surgeons* does not even cite *Williamson County*, much less overrule it. Moreover, the Supreme Court has cited *Williamson County*'s state-court compensation requirement with approval after *College of Surgeons* in the *Del Monte Dunes* case. NAHB relies on the 1999 "Takings Retreat Report," even though the report expressly declined to advocate change in the essentials of *Williamson County*'s ripeness requirements, and the ABA Section on State and Local Government Law (which co-sponsored the retreat) refused to ratify the report.

Fortunately, at oral argument the Eighth Circuit expressed little sympathy for NAHB's misreading of *College of Surgeons*. But NAHB's website trumpets the case and vows to take it "all the way to the U.S. Supreme Court if necessary." We'll keep readers apprised of future developments. (For copies of the briefs, including CRC's amicus brief, and a tape recording of the oral argument, go to http://www.ca8.uscourts.gov).

OUTRAGE OF THE MONTH

The Devious Dog in the Manger

As noted in last month's *Takings Watch*, the claimants in the IOLTA takings case pending before the Supreme Court suffer no economic harm from IOLTA and thus have nothing to gain economically from their campaign against the program. This circumstance prompted one judge to compare the claimants to the dog in Aesop's fable who refused to let the cow into the manger to eat hay, even though the hay was no use to the dog.

In recent months, Washington Legal Foundation's barking has become even more mean-spirited. In a September 2002 fundraising letter, WLF tells potential donors that IOLTA supports "radical legal groups all across the country" and suggests that IOLTA funding goes to left-leaning political groups. The truth is that IOLTA funding goes to groups that provide legal services to the impoverished. In other words, WLF is misleading its supporters about the nature of IOLTA-funded legal services in order to raise money to support its anti-IOLTA crusade. An amicus brief filed by AARP and others accurately describes WLF's fundraising letter as a "gross mischaracterization" of IOLTA and provides many real-world examples of how IOLTA has helped poor people fight unjustified evictions from their homes, protected the elderly from fraud, assisted the indigent in coping with medical crises, and addressed myriad other legal issues faced by those who otherwise could not afford representation.

Hats off to AARP and its fellow amici for setting the record straight. And shame on WLF for distorting the truth for the sake of a buck.

QUOTE OF THE MONTH

"[T]here are a number of state courts that do not completely agree about the proper application of *Nollan* and *Dolan* -- due in no small part to the misinformation so often presented to them by opponents of municipal regulation." Amicus Brief of National Association of Home Builders, *Town of Flower Mound v. Stafford Ltd. Prtnrshp.* (Tex. Oct. 31, 2002).

Ed. Note: Perhaps NAHB meant to say "proponents" rather than "opponents," but on the other hand perhaps it's a quantum leap in self-recognition.

EYE ON WASHINGTON

Bass Enterprises Production Co. v. United States, 2002 WL 31526504 (Fed. Cl. Nov. 13, 2002)

The Supreme Court's *Tahoe* decision is starting to have a salutary ripple effect on land use litigation. Most recently, in *Bass Enterprises*, the Court of Federal Claims reconsidered and reversed a takings ruling in light of *Tahoe*.

The government in *Bass* denied the plaintiffs a permit to extract oil and natural gas in an area that had been set aside for nuclear waste disposal. The Bureau of Land Management characterized the decision as a delay of regulatory action pending final review of the feasibility of drilling. In March 2002 (just prior to *Tahoe*), Judge Hodges held that the denial was a per se temporary taking and awarded the plaintiffs more than $1.1 million.

After *Tahoe*, the government moved for reconsideration. Judge Hodges agreed that *Tahoe* required the court to employ *Penn Central*'s multifactor test instead of a per se rule. He concluded that the government's interest in determining whether drilling for oil and gas could make the nuclear waste facility unstable was "a serious public health and welfare concern." Employing the parcel-as-a-whole rule reaffirmed in *Tahoe*, the court evaluated the economic impact as a fraction of the "entirety of the economic value," concluding that the diminution of $1.1 million amounted to just five percent of the value of the property. As the court stated: "[T]he importance of government action to public health and safety, and the negligible economic impact, negate the possibility that plaintiffs could prevail on any takings theory."

This 180-degree reversal is the latest in a series of cases that have denied takings claims through express reliance on *Tahoe*. In *Walcek v. United States*, 303 F.3d 1349 (Fed. Cir. 2002), the Federal Circuit invoked *Tahoe* to reject the claim of beachfront property owners who argued that wetlands protections effected a taking. In the July *Takings Watch*, we alerted you to a similar reliance on *Tahoe* by the Pennsylvania Supreme Court in *Machipongo*. There should be little doubt that *Tahoe* is making its presence felt.